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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

ALLISON HERRING SCHWARTZBERG et al.,

Plaintiffs and Appellants,

v.

WARMINGTON HOMES CALIFORNIA,

Defendant and Respondent.

C037261

(Super. Ct. No. 99AS05292)

The plaintiffs, Allison Herring Schwartzberg and Starlyn Herring (her minor daughter), appeal from the judgment dismissing defendant Warmington Homes California (Warmington) from their ongoing personal injury action, following defendant Warmington's successful motion for summary judgment.¹ As the judgment acted as an implied denial (by operation of law) of their outstanding motion for reconsideration,² we deem their

¹ *Aguilar v. Universal City Studios, Inc.* (1985) 174 Cal.App.3d 384, 387, footnote 1 (*Aguilar*).

² *APRI Ins. Co. v. Superior Court* (1999) 76 Cal.App.4th 176, 182; *Eddy v. Sharp* (1988) 199 Cal.App.3d 858, 863, footnote 3.

notice of appeal to embrace that issue as well (notwithstanding the argument to the contrary of defendant Warmington). The trial court ruled that the plaintiffs failed to produce evidence supporting the theories of respondeat superior or negligent hiring and supervision under which they would hold defendant Warmington liable for the actions of its employee. We agree and thus shall affirm.

SCOPE OF REVIEW

The purpose of summary judgment "is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute."³ Under "[t]he historic paradigm for our de novo review of a motion for summary judgment . . . [w]e first identify the issues framed by the pleadings since it is these allegations to which the motion must respond. We then determine if the moving party has established a prima facie entitlement to judgment in its behalf. Only if the moving party has satisfied this burden do we consider whether the opposing party has produced evidence demonstrating there is a triable issue of fact with respect to any aspect of the moving party's prima facie case."⁴

"[T]he Legislature has given a 'federal' flavor to the nature of the moving party's prima facie case. Previously, the moving

³ *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 844 (*Aguilar*).

⁴ *Rio Linda Unified School Dist. v. Superior Court* (1997) 52 Cal.App.4th 732, 734-735 (*Rio Linda School Dist.*).

party could establish its prima facie entitlement to judgment only by demonstrating the existence of facts which negated an element of the opponent's case. (*AARTS Productions, Inc. v. Crocker National Bank* [(1985)] 179 Cal.App.3d [1061,] 1064.) Now, however, the moving party is not limited to supporting its motion with affirmative evidence. It may also establish its prima facie entitlement to judgment by demonstrating [that] its opponent's discovery responses are devoid of evidence to support an element of the opponent's case,"⁵ and that the opponent "cannot reasonably obtain . . . evidence that would allow [a reasonable] trier of fact to find any underlying material fact more likely than not."⁶ In evaluating circumstantial evidence, the court must take into consideration all inferences *reasonably* drawn from the evidence in favor of the opponent.⁷

THE PLEADINGS

According to the plaintiffs' amended pleading, on August 19, 1999, Carl Mignone (another defendant not a party to this appeal) negligently crashed his pickup truck into the plaintiffs' vehicle as they were travelling on the interstate, causing them injuries. In their first "cause of action,"⁸ the plaintiffs alleged that defendant Mignone "was the agent and

⁵ *Rio Linda School Dist.*, *supra*, 52 Cal.App.4th at page 735.

⁶ *Aguilar*, *supra*, 25 Cal.4th at page 845.

⁷ *Aguilar*, *supra*, 25 Cal.4th at pages 844-845.

⁸ *Rio Linda School Dist.*, *supra*, 52 Cal.App.4th at page 735, footnote 2 (noting frequent confusion in pleadings of "causes of action" with theories of liability).

employee" of defendant Warmington, "and in performing the acts referred to herein[] was acting in the course and scope of his agency and employment" with defendant Warmington. In their alternative theory of liability, the plaintiffs alleged the defendants "knew . . . or in the exercise of reasonable diligence should have known that defendant MIGNONE was incompetent and unfit to perform the duties for which he was employed, and that undue risk to persons such as Plaintiff[s] would exist because of said employment."

The conclusory allegations did not include any supporting facts. As will become clear, this was a function of the absence of any evidence in the plaintiffs' possession.

SUPPORTING EVIDENCE

In support of its motion, defendant Warmington submitted defendant Mignone's responses to form and special interrogatories that the plaintiffs propounded, portions of the deposition of defendant Mignone, the depositions of defendant Mignone's superiors, the depositions of two other employees of defendant Warmington, and a transcript of an interview that the attorneys for the plaintiffs conducted with defendant Mignone (which defendant Warmington obtained pursuant to a document request). Although defendant Mignone objected to consideration of the latter, the trial court did not explicitly rule on the objection and thus it is waived on appeal.⁹ For purposes of

⁹ *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1186, footnote 1.

clarity, we will occasionally resort at this point to other portions of the deposition of defendant Mignone that the parties introduced in their opposition and reply. We first aggregate the facts more directly related to the issue of respondeat superior, then those involving negligent hiring.

A

On the day of the accident, defendant Mignone, a diabetic, injected himself with insulin in the early morning before leaving for work at a 70-lot Roseville subdivision called "The Warmington Collection," where he was the new assistant superintendent. In driving between his Rancho Cordova home and the job site, he traveled on the main roads of Highway 50, Watt Avenue, and Interstate 80. Along this route, he would pass the Greenback Lane overcrossing in Citrus Heights.

The project superintendent had responsibility for several job sites. Defendant Mignone worked under his direction, primarily "interfacing" on a day-to-day basis with subcontractors and homebuyers, performing detail work in the completed homes, and completing any general laborer work as needed. Though defendant Mignone was responsible for the Collections subdivision, the project superintendent could assign him to other locations as needed.

Arriving at work about 7 a.m., he did not have any specific assignments for that day beyond reading some employment-related documents. There was very little to supervise at this job site at this point. Only the concrete subcontractors were at work, pouring foundations; the project superintendent and defendant

Mignone were the sole Warmington construction employees.

The superintendent left the subdivision about 11 a.m. telling defendant Mignone to check with the assistant superintendent at the neighboring "Classics" subdivision if he needed something to do. Defendant Mignone believed the only people with whom he spoke that day were the project superintendent, the sales agent, and the Classics assistant superintendent.

Defendant Mignone spent some time reading the plans and specifications for the subdivision, then decided to take care of a repair that the superintendent had identified. This involved replacing a dented front panel on a dishwasher in one of the two completed model homes on the job site. (The sales office was in the other model home.) Although initially testifying this was about 10 or 11 a.m., defendant Mignone later admitted he could not really recall the time. He drove to the job trailer, which was about a block away, to get a new panel. Returning to the model, he began the repair. It was a task that should have taken from 15 to 30 minutes. This was his last clear memory before regaining consciousness in his truck after the accident, which occurred about 1 p.m. a quarter-mile west of Greenback Lane. The responding patrolman cited him for driving an uninsured and unregistered truck. Defendant Mignone was not insured under any other individual policies.

The project supervisor claimed defendant Mignone was required to get permission to leave the job site, which was a common industry practice. However, defendant Mignone neither notified his supervisor nor anyone else before driving off.

He could not remember anyone asking him to go anywhere. He did not recall leaving the model home or driving to the interstate.

Defendant Mignone attributed his blackout to hypoglycemia. This had never happened to him before while driving (although on one previous occasion a coworker summoned an ambulance after seeing him acting oddly). He usually would have a forewarning in the form of numbness of the mouth or light-headedness; a snack or a glucose supplement (both of which he had with him that morning) would take care of the problem. He had brought a sandwich for lunch, but he recalled that at some point during that morning he decided he did not want to eat it and would instead go off-site for lunch. (The sandwich was still in the cooler in his truck when the accident occurred.)

Defendant Warmington did not mandate a specific time for lunch; defendant Mignone did not punch a time card. He usually ate lunch between noon and 1 p.m., and had not yet eaten at the time he blacked out. In his responses to interrogatories and in his deposition testimony, he could not recall a specific purpose or destination when he left the job site. However, in his interview with the plaintiffs' attorneys, he stated, "I remember leaving for lunch. I remember . . . I had a peanut butter and jelly sandwich which just didn't sound good to me, and so I decided to go get something to eat. That's the last thing I can . . . I remember getting in the truck, but . . . apparently I was out of it then because I didn't put my seat belt on and I always do that. So apparently my blood sugar was low at that point." Although he could not recall where he was

going, he was "almost positive" that he was getting "something to eat. You know, to go to a fast food place. But . . . I don't remember leaving. . . . I don't remember what direction, where I was headed." He agreed he was speculating somewhat about his purpose.

The Warmington employees at the Classics job site asserted they never had cause to go to a job site other than Classics or Collections. The subordinate never left the job site except for lunch and always checked with the assistant superintendent before leaving.

B

Defendant Mignone's resume included over 20 years of experience in the construction industry. During his interview with the project superintendent and a Warmington vice-president, defendant Mignone mentioned his diabetes and said it was under control with medical care. Defendant Mignone noted a drop in blood sugar could cause light-headedness, which food or medication would correct. He did not indicate that blackouts were possible (as his condition had not previously caused any problems), and his interviewers did not ask (as they were not familiar with the effects of diabetes and were unaware of the possibility of blackouts). The interviewers did not ask whether he needed any accommodations for his medical condition, or the name of his doctor whom he had last consulted about six or seven years earlier. Although driving from one construction site to another and occasionally obtaining supplies from hardware outlets were among the responsibilities for the job,

for which an assistant superintendent received a car allowance, the interviewers were not concerned about his driving ability. They checked defendant Mignone's employment references, and determined that he had a valid class C California driver's license (last renewed in 1998), but otherwise did not conduct any follow-up.

OPPOSITION

Both the plaintiffs and defendant Mignone filed opposition to defendant Warmington's motion. Although there is no explicit explanation for defendant Mignone's participation, we assume the court and the other parties permitted it to avoid any possible claims of issue preclusion in defendant Mignone's open workers' compensation case.¹⁰ The evidence included further excerpts from the depositions of defendant Mignone and others that defendant Warmington had produced, defendant Mignone's responses to the plaintiffs' special interrogatories, the declaration of defendant Mignone, a copy of the accident report, a photograph of plaintiff Schwartzberg's injuries and medical reports of the trauma to both plaintiffs resulting from the accident, and a declaration of the plaintiffs' lawyer.

¹⁰ Compare *Columbus Line, Inc. v. Gray Line Sight-Seeing Companies Associated, Inc.* (1981) 120 Cal.App.3d 622, 630-631 (issue preclusion because codefendant allied with plaintiff), with *Sutton v. Golden Gate Bridge, Highway & Transportation Dist.* (1998) 68 Cal.App.4th 1149, 1155-1157, and *White Motor Corp. v. Teresinski* (1989) 214 Cal.App.3d 754, 763 (no issue preclusion because no incentive to litigate).

In response to the objection of defendant Warmington, the plaintiffs' lawyer apologized to the trial court for including the photograph, as the extent of the plaintiffs' injuries were not material to the motion. The same is true of the medical reports. The court did not expressly rule on the remainder of defendant Warmington's objections, which are thus deemed waived on appeal.

At the hearing on the motion, defendant Mignone objected to the accident report "under hearsay." The trial court sustained the objection while simultaneously conceding the report would be admissible at trial. As the most significant fact in the accident report is the statement of a party to this action (defendant Mignone) and there is nothing in the record to rebut the presumption of trustworthiness in the officer's firsthand observations, we will overrule the trial court's ruling to this extent.¹¹

According to the responding patrolman, defendant Mignone "related from the San Juan [H]ospital emergency room bed that he cannot recall the accident. He did not know that he had been involved in [the] accident[,], since the last thing he remembers is that he was leaving his job at Warmington Homes in Roseville, off of Pleasant Grove Blvd. to go to lunch." Defendant Mignone's blood-sugar level at the time of the accident was 31.

¹¹ Evidence Code sections 1220, 1280; *Jackson v. Department of Motor Vehicles* (1994) 22 Cal.App.4th 730, 736, 738-740.

At the hospital, it returned to an acceptable level of 187 after physicians administered glucose.

In his deposition, defendant Mignone noted he was not familiar with Roseville. There was no pattern to whether he ate on-site or off-site, or at what time. Although he believed in working through his lunch to make a good impression, he had not needed to do this in his first few days on the job. He did not know the closest restaurants or those along the interstate, though he acknowledged he had eaten at most of the chain restaurants in the vicinity and knew to look in commercial areas for them. Before starting work at the Collections site, he had done some work at Warmington sites in Davis and South Natomas, which were further along in the process of construction. He had also accompanied the project superintendent to the Reuter Ranch site in Roseville off Douglas Road to meet the people there. He also may have gone to the main Warmington office on Douglas Road in Roseville two or three times. Otherwise, no one during his brief tenure with defendant Warmington had asked him to drive off-site and he had not taken it upon himself to do so. He had not yet received a company credit card for purchasing supplies or a company phone. He would expect any meetings with subcontractors to take place on-site.

Another Warmington assistant superintendent noted there were three hardware outlets where he would occasionally get supplies. This would occur two to three times per month.

In defendant Mignone's responses to the plaintiffs' special interrogatories, he noted defendant Warmington fired him in late

September because his driver's license was suspended as a result of the accident. He denied he needed to get permission to leave the job site for errands or for lunch (an assertion he repeated in his declaration in opposition). While he also claimed to be acting in the course and scope of his employment at the time of the accident, we disregard this response because it is a legal conclusion, which is incompetent to oppose a motion for summary judgment.¹²

RULING

In its ruling on the issue of respondeat superior, the superior court noted, "It is undisputed that defendant Mignone was an employee of Warmington on the day of the accident and that Mignone caused the accident Defendant established through admissible evidence that Mignone had no work-related reason for being where he was at the time of the accident. This is sufficient to shift the burden to plaintiff[s]. Plaintiffs concede that they have no evidence to show that plaintiff was on a work[-]related errand." In response to their arguments, "the court concludes that plaintiffs have failed to meet their burden. The inferences they wish to draw from the limited evidence are nothing more than speculation." As for the cause of action for negligent hiring, "Defendant established through admissible evidence that the only information in its possession

¹² *Benavidez v. San Jose Police Dept.* (1999) 71 Cal.App.4th 853, 864-865; *Hoover Community Hotel Development Corp. v. Thomson* (1985) 167 Cal.App.3d 1130, 1136-1137.

regarding Mignone's diabetes was that he suffered from it and that it was controlled by medication. This shifted the burden to plaintiff[s] to raise a triable issue of material fact. . . . Plaintiffs' argument is that hiring someone with diabetes for a job that requires driving a vehicle is a breach of duty toward all third parties on the roads. Plaintiffs cite no authority. The court does not agree, and also notes that plaintiffs' argument is contrary to the public policy behind the ADA and FEHA regarding the hiring of qualified individuals with disabilities."

DISCUSSION

I

A

We have related the facts included in the supporting papers at length because this case turns on a negative. From the plaintiffs' perspective, at best the evidence shows defendant Mignone had absolutely no memory of his object and destination when he left the job site. At worst (as in defendant Mignone's most contemporaneous statement), he was getting something to eat. However, there is no affirmative evidence that defendant Mignone was acting in the course and scope of his employment.

The plaintiffs thus must resort to inference. Whether these inferences flow legitimately from the evidence is

a question of law.¹³ Inferences cannot be based on a mere possibility or "flow from suspicion alone, or from imagination, speculation, supposition, surmise, conjecture or guesswork."¹⁴ Thus, a legitimate inference cannot flow from the nonexistence of a fact; if the existence of an essential fact is uncertain, "'the party upon whom the burden rests to establish that fact should suffer, and not [the] adversary.'"¹⁵

It would have been the plaintiffs' burden at trial to prove that defendant Mignone was acting in the course and scope of his employment.¹⁶ As a result, their opposition to the motion must demonstrate there was some evidence from which a reasonable trier of fact could find the necessary underlying material inferences more likely than not.¹⁷

The plaintiffs argue defendant Mignone could not have been getting lunch, because he passed a host of food emporia in the course of his travel before the accident. This ignores the fact that he was by then in the grip of hypoglycemia and his actions were no longer subject to his conscious control. As for their various suggestions that defendant Mignone could have been

¹³ *California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 44-45, 47 (*California Shoppers*).

¹⁴ *California Shoppers, supra*, 175 Cal.App.3d at page 47.

¹⁵ *Reese v. Smith* (1937) 9 Cal.2d 324, 328; *California Shoppers, supra*, 175 Cal.App.3d at page 45.

¹⁶ *Debbie Reynolds Prof. Rehearsal Studios v. Superior Court* (1994) 25 Cal.App.4th 222, 226.

¹⁷ *Aguilar, supra*, 25 Cal.4th at page 845.

heading to another job site or the Warmington main office or home, or could have been on a work-related errand, these are nothing more than guesses. There are no facts from which these posited purposes can rationally be drawn.

The plaintiffs claim it is sufficient to raise an inference in favor of a finding of respondeat superior liability that defendant Mignone was driving in a company-required vehicle (for which he received an allowance) during the workday. Their authority does not support this proposition. In each of the cases they cite, an employee was driving a vehicle that the employer **owned**.¹⁸ As stated in the authority on which Meyer rests, ". . . 'The law is established in California that, if there is proof that (1) an automobile belongs to an employer, and (2) at the time of an accident is being operated by an employee of the owner, an inference arises sufficient to support a finding that the employee was operating the automobile (a) by the authority of his employer, and (b) within the scope of his employment.'"¹⁹ While the plaintiffs brush away the difference between a company-owned car and a company-required car as not being "an important legal distinction," they do not cite any authority for broadening this prerequisite for the inference.

¹⁸ *Meyer v. Blackman* (1963) 59 Cal.2d 668, 675; *Westberg v. Willde* (1939) 14 Cal.2d 360, 371; *Fuller v. Chambers* (1959) 169 Cal.App.2d 602, 607-608.

¹⁹ *Halbert v. Berlinger* (1954) 127 Cal.App.2d 6, 17-18; accord, *Rosenberg v. Berry* (1950) 101 Cal.App.2d 526, 529-531 (and cases discussed therein).

Thus, the mere fact defendant Mignone was driving in a company-**required** car is not sufficient to defeat summary judgment.

They attempt to invoke the doctrines under which an employee pursuing a personal errand²⁰ or travelling between work and home²¹ can be deemed to be acting in the scope of employment. These arguments founder on the complete absence of positive evidence that defendant Mignone had **any** business purpose in leaving the job site.

Finally, the plaintiffs attempt to analogize defendant Mignone's diabetic coma commencing on the job site (if we accord them that favorable a reading of the evidence) to the actionable inebriation of employees resulting from drinking on the job site after work.²² In doing so, the plaintiffs entirely disregard the criteria we discussed in *Childers*: whether the activities within the course and scope of employment "that cause the employee to become an instrumentality of danger to others"²³ were undertaken with the employer's permission, were of benefit to the employer, and were a customary incident

²⁰ E.g., *Meyer, supra*, 59 Cal.2d at page 676 (where employee pursuing "dual purpose," or where facts show only a "slight deviation" from employer's business).

²¹ E.g., *Hinojosa v. Workmen's Comp. Appeals Bd.* (1972) 8 Cal.3d 150, 160 (where employer requires car); *Breland v. Traylor Eng. etc., Co.* (1942) 52 Cal.App.2d 415, 424-426 (where employer pays for commuting expenses).

²² *Childers v. Shasta Livestock Auction Yard, Inc.* (1987) 190 Cal.App.3d 792, 803-806 (*Childers*).

²³ *Childers, supra*, 190 Cal.App.3d at page 805.

of employment.²⁴ The procrustean nature of the task of cramming the present facts into these criteria is evident on its face.

There being no evidence supporting the theory of respondeat superior, the trial court properly granted summary judgment in this respect.²⁵ We turn to the alternative theory.

B

Essential to liability for the tort based on "negligent hiring" is evidence that "the employer knows, or should know, that the employee, because of past behavior or other factors, is unfit for the specific tasks to be performed."²⁶ To the extent there exists a distinct species of "negligent supervision," there must be evidence of the employer's knowledge that the employee cannot be trusted to act properly without supervision.²⁷

There is no evidentiary or legal showing that the condition of diabetes of itself renders a person incapable of driving, and as the trial court noted, such an argument is offensive to public policy. There is no evidence that defendant Mignone's diabetes in particular ever presented a danger in the past while he was working or driving. Defendant Warmington was entitled to rely on his representation that he was capable of keeping his blood sugar under control at the first signs of light-

²⁴ *Childers, supra*, 190 Cal.App.3d at page 806.

²⁵ Cf. *Rio Linda School Dist., supra*, 52 Cal.App.4th at page 741.

²⁶ *Federico v. Superior Court* (1997) 59 Cal.App.4th 1207, 1215.

²⁷ See *Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654, 664 (*Noble*).

headedness. Nor is it of any moment that the interviewers did not inquire more deeply. Defendant Mignone did not himself have any indication he might present a danger while driving. Finally, defendant Warmington could rely on his status as a lawfully licensed driver; a diabetes-related incident in the past would have triggered a suspension as in the present matter.²⁸

As there is consequently **no** evidence that a diabetic driver in general or defendant Mignone in particular would present a threat to others, the plaintiffs have failed to establish this necessary element of negligent hiring or supervision. The trial court was therefore correct in granting summary judgment on this theory as well.²⁹

II

In requesting the court reconsider its ruling on the motion for summary judgment on the basis of an expert opinion, the plaintiffs' lawyer claimed their "diabetes expert" was "out of the country from September 20 to October 14, 2000." Defendant Warmington had noticed the motion for summary judgment on September 15 for October 26, the date on which counsel appeared and argued. There is no explanation why the plaintiffs had not consulted their diabetes expert well before the motion for summary judgment, as defendant Mignone's diabetic blackout was

²⁸ See *Noble, supra*, 33 Cal.App.3d at page 664.

²⁹ Cf. *Rio Linda School Dist., supra*, 52 Cal.App.4th at page 741.

not a secret, or immediately after receiving notice of the motion, or sought a continuance after his return 12 days before the motion. In its ruling on the motion after entry of judgment (which, as noted earlier, was without effect),³⁰ the court concluded the expert's opinion was available prior to the notice of the motion for summary judgment and thus did not satisfy Code of Civil Procedure section 1008.

In requesting reconsideration of a ruling on the basis of new or different facts, a party must satisfy a strict standard of diligence in providing a satisfactory explanation for failing to submit the evidence before the ruling.³¹ The plaintiffs' sole argument on the issue of reconsideration appears in a footnote to their opening brief, and relies on a factually inapposite case involving a motion for new trial in which new facts discovered just before trial would have changed the expert's opinion offered at trial had he been told of them.³² In the present case, by contrast, the facts underlying the expert's opinion had been clear since the August 1999 accident. This does not amount to diligence of any sort, and is woefully short of demonstrating the plaintiffs' entitlement to rehearing as a matter of law. We thus do not find any basis for reconsideration in light of the additional evidence.

³⁰ See footnote 2, *ante*.

³¹ *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 690.

³² *Andersen v. Howland* (1970) 3 Cal.App.3d 380, 383-384.

DISPOSITION

The judgment is affirmed.

DAVIS , J.

We concur:

SCOTLAND , P.J.

CALLAHAN , J.